IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1597 OF 2000
WITH
CRIMINAL APPLICATION NO. 188 OF 2006

Mr. Vivek Talwar ..Petitioner
(Org.Accd.No.1)

Vs.

The State of Maharashtra and anr. ..Respondents

Mrs. R.R. Dhuru for petitioner.
Mr. P.A. Pol, APP for State.
Mr. P.R. Shenai, respondent no.2, in person present.

CORAM: B.H. MARLAPALLE,J.

Reserved on : August 08, 2007.

Pronounced on : August 30, 2007.

JUDGMENT:

1. This petition filed under Article 227 and read with Section 482 of Cr.P.C., at the first instance, impugns the order dated 29/8/2000 passed by the learned Metropolitan Magistrate, 31st Court, Vikhroli, Mumbai rejecting the application for discharge filed in Criminal Case No. 29/C/96 and secondly it prays for quashing the proceedings in the said criminal case as far as the petitioner is concerned.

2. As per the petitioner M/s. NITCO Tiles Ltd.

is a company registered under the Companies Act, 1956 and the petitioner is the Managing Director of the said company. The Company had acquired land for construction of a factory manufacturing Ceramic Tiles at Alibag and it had entered into a contract with M/s. Venkatesh Constructions (accused no.3) for the levelling and the filling of the said land. It appears that accused no.3, in turn, sub-contracted the work to another firm by name M/s. Sterling Engineering Company, a sole proprietary concern with its registered office at 2/94 Vaishnavi, Garodia Nagar, Ghatkopar (E), Mumbai 400 077 (hereinafter referred to as the sub-contractor) and accused no.3 (the contractor) is alleged to have placed an order with sub-contractor on 11/5/1995 thereby specifying the work to be done by the sub-contractor at the site. As per the said Work Order condition no.7 stated that bills raised by the sub-contractor on weekly basis and certified by the site Engineer would be paid within seven days and the total area of earth filling was approximately 2 lacs mtrs. The work was to be completed within 45 days from the acceptance. The sub-contractor carried out the work and submitted his bills to the contractor and the total bill amount was

Rs.9,16,455/-. The bills were dated 22/5/1995, 5/6/1995, 11/6/1995, 19/6/1995 and 5/7/1995. However, the bill amount was not released and the sub-contractor addressed letters to the contractor (accused no.3). The last such letter addressed by the sub-contractor to the contractor was dated 20/6/1995 and there was no response from the contractor. The sub-contractor, therefore, addressed registered notice on or about 2/9/1995 for the recovery of the pending bills amount and on or about 6/2/1996 he filed Criminal Case No.29/C/1996 for the offence punishable under Section 420 read with Section 34 of IPC alleging that he was made to suffer wrongful loss and the accused made false representations. Along with the contractor (accused no.3), the complainant also impleaded accused no.4 Shri Atul Panchamia, who is a resident of Ghatkopar and allegedly had approached the complainant (sub contractor) sometimes in the month of April 1995 and had represented on behalf of the accused nos.1 to 3. Accused no.2 was the General Manager of M/s. NITCO Tiles Ltd. and in the meanwhile he had left the said company's service and, therefore, he could not be served and consequently, the complaint has been dismissed against the said

accused no.2 by deleting his name.

3. The sub-contractor has, through Mrs. Prabha P. Shenai claiming to be the sole Proprietress of the sub-contractor - firm, filed Summary Suit No. 2569 of 1998 on the Original Side of this Court against the contractor - accused no.3 for the recovery of Rs.16,67,638/- on or about 4/5/1998 i.e. after the criminal complaint was initiated and the said suit is presently pending. Summons for Judgment No.646 of 1998 filed in the said suit came to be dismissed on 22/2/2000. The present petitioner filed an application for being discharged (Exh.6) before the learned Metropolitan Magistrate and at the same time accused no.3 also filed a similar application for discharge (Exh.7) and both the applications came to be rejected by a common order dated 29/8/2000. It is also pertinent to note that Regular Civil Suit No.110 of 1996 was filed by the accused no.3 against the company for recovery of dues and the said suit was compromised on 9/12/1996 between the plaintiff and the defendant-company. By the said compromise decree, the defendant - company agreed to pay to the plaintiff a sum of Rs.10,00,000/- before deducting TDS in full and

final settlement towards the jobs undertaken and done by the plaintiff or by any of his sub-contractors. It was further stated in the said decree that any claim of the sub-contractors in respect of the work done at the site of the company and in respect of the contract given to the plaintiff shall be the responsibility of the plaintiff. It was further stated that the dispute between the plaintiff and M/s. Sterling Engineering Company or with any other sub-contractor will be settled by the plaintiff and the defendants were not responsible for any dues which would be payable by plaintiff to any sub-contractor or anybody working for plaintiff. It was further stated that the defendants or their employees had no concern whatsoever with M/s.Sterling Engineering Company.

4. The petitioner had claimed before the learned Metropolitan Magistrate that the complaint was not maintainable on territorial grounds, the dispute for recovery of the bills amount was a civil dispute and in any case there was no privity of contract between the present petitioner and the complainant. The learned Magistrate appears to have been influenced by the statement made by the complainant that when he had

stopped progress of the work, as accused no.3 did not make payment, accused nos.1 and 2 had approached him and requested to re-commence the work urgently and assured that payments for the work done by the complainant through accused no.2 would be cleared. Accused No.2 allegedly had told the complainant to carry out the work and submit a copy of the bill to accused no.1 who shall, in turn, make the payment directly. This assurance was believed by the complainant and he re-commenced the work. The application for discharge was filed before the complainant had an opportunity to produce his evidence and, therefore, it was devoid of substance. On the point of jurisdiction the learned Magistrate held that though the site, where the work was carried out, is located in Raigad District, the representation to the complainant was made within his jurisdiction and, therefore, it could not be said that the complaint was entertained without jurisdiction.

5. Mrs. Dhuru the learned counsel for the petitioner submitted that the power of discharge under Section 245 (2) of Cr.P.C. can be exercised by the Magistrate at any stage of the criminal proceedings

provided that the Magistrate is satisfied that the charge is groundless and the main object of Section 245 of Cr.P.C. is to find out whether any prima facie case has been made out or not before framing the charge. The petitioner, by the discharge application, had made out a case to satisfy that the cognizance had been wrongly taken against him in the complaint filed by the sub-contractor and there could be no charge of cheating against the petitioner in the Work Order issued by accused no.3 in favour of the complainant-sub-contractor. The entire tenor of the complaint speaks of representations having been made by the original accused no.4 and except the contention that on suspending the work, accused no.2 had made representation to the complainant that he should immediately restart the work and it would be ensured that the bills are cleared urgently. She, therefore, submitted that when there was no privity of contract admittedly between the complainant and the petitioner, there was not even prima facie case of cheating that was made out against the petitioner and consequently there would be no justification for the petitioner to go through the ordeal of trial.

5A. The present respondent no.2 has filed his reply as well as written arguments. There is no dispute regarding the pendency of the Summary Suit No.2569 of 1998 on the Original Side of this Court for the recovery of the very same amount about which he claims that there was an offence of cheating against the petitioner and the said suit has been filed by the wife of the complainant claiming to be the sole Proprietress of the very same firm i.e. the sub-contractor. It is also admitted in his written reply by the complainant that there was no privity of contract between the petitioner and the complainant. He alleges that accused no.1 wanted the work to be completed very fast and he made a wrongful representation on account of which the complainant suffered wrongful loss to the tune of Rs.9,16,455/-. It is also admitted that the Work Order was placed by accused no.3 and the bills were raised by the complainant on accused no.3. There is also no dispute that M/s. NITCO Tiles Ltd. and the present petitioner have already settled the pending bills of accused no.3 in RCS No.110/96 and pursuant to the compromise decree passed in the said suit. The Company has paid an amount of Rs.10,00,000/- to

accused no.3. It is also clear in the said compromise decree that it would be responsibility of the accused no.3 to clear the bills of his sub-contractors who were working on the site of the Company.

6. On the point of jurisdiction, there is no prima facie documentary evidence to show that within the jurisdiction of the learned Metropolitan Magistrate, Vikhroli, at any point of time the present petitioner had carried out negotiations with the complainant or called upon him to restart the work and that the company took the responsibility of clearance of the bill. There is a bald statement made in the complaint that it was accused no.2 who met the complainant on behalf of the accused no.1 and impressed upon the complainant to restart the work on the promise that the bills submitted would be cleared expeditiously. The complaint taken as it is, does not make out even a prima facie case against the petitioner warranting him to undergo the trial for an offence of cheating. The entire dispute of the complainant is with accused no.3 and in the absence of any documentary evidence, even prima facie, that the complainant was engaged by the petitioner-accused

no.1, there is no justification in asking the petitioner to face the trial. The complaint does not make out a triable case against the petitioner for an offence punishable under Section 420 read with Section 34 of IPC. I have gone through the documents annexed to the complaint and there is not even a bill which was received by the petitioner on behalf of M/s. NITCO Tiles Ltd. and issued by the complainant. The complainant admits that all the pending bills were issued against the accused no.3 and they were pending with accused no.3. Merely because the reminders were addressed to the accused no.3 along with accused no.1, there cannot be a cause of action to implead the accused no.1 as a person who had induced the complainant and cheated and has caused wrongful loss to him. In the absence of any contract between the complainant and M/s. NITCO Tiles Ltd., neither the company nor the petitioner is required to face the trial. It is also pertinent to note that M/s. NITCO Tiles Ltd. has not been impleaded as an accused and as noted earlier, the petitioner was at the relevant time holding the post of Managing Director of the said company. He cannot be prosecuted in his personal capacity and if he has to be prosecuted as the person

holding the post of Managing Director, it is necessary that M/s. NITCO Tiles Ltd. is an accused at the first instance. For all these reasons, the order passed by the learned Metropolitan Magistrate rejecting the application for discharge is unsustainable.

7. The complainant in his written submissions has relied upon the decision of this court in the case of V.K. Jain and ors. vs. Pratap V. Padode and anr. [2005 (3) Mh.L.J. 778] and submitted that the remedy for the petitioner was to approach the Sessions Court to challenge the order passed by the learned Metropolitan Magistrate. The farad-sheet shows that this petition was admitted on 8/1/2003 and the decision of this court in V.K. Jain's case, by referring to the decisions of the Supreme Court in the case of Adalat Prasad vs. Rooplal Jindal and ors. [2004 (4) Mh.L.J. 274] and Subramanium Sethuraman vs. State of Maharashtra and anr. [2005 (1) Mh.L.J. 626], has been rendered on 21/6/2005 and once the petition was admitted it cannot be dismissed on the ground of alternative remedy and, in fact, it is required to be decided on merits. Even if the

complainant has applied for restoration of the suit filed by the accused no.3, challenging the compromise decree, that by itself cannot be a reason forcing the petitioner to face the trial.

8. Hence, the petition succeeds and the same is hereby allowed by making Rule absolute in terms of prayer clause (i).

9. Criminal Application No. 188 of 2006 does not survive and shall stand disposed as such.

**(B.H. Marlapalle,J.)**